

Senate Should Reject Proposals to Weaken PATRIOT Act

If Congress does not act in the coming weeks, three vital national security tools to fight terrorism and prevent attacks will expire.¹ These tools, established in the wake of the September 11th attacks, have helped federal law enforcement stay ahead of terrorists to thwart planned attacks. Senator Leahy has introduced legislation that would reauthorize expiring provisions of the PATRIOT Act, *but with significant changes to existing national security law.*² These flawed changes would increase burdens on investigators, treat national security matters with less urgency than domestic criminal matters, and drain federal resources that should be focused on keeping the nation safe. If the Leahy bill passed, national security investigators would face greater procedural hurdles to using critical surveillance tools – many of which have long been readily available to law enforcement in run of the mill criminal cases.

A new sunset on National Security Letters. The bill would not only make changes to the provisions set to expire, it would also impact other investigative tools, including national security letters (NSLs). NSLs are a key component of anti-terror investigations that allow government investigators access to non-content information, such as telephone toll records held by a telecom company. This type of information is critical to the early stages of investigations, and an analogous tool (administrative subpoenas) has existed for years in the law enforcement context for health care fraud and narcotics investigations. The Leahy bill would impose a new December 31, 2011, sunset on NSLs as established by the USA PATRIOT Act, introducing uncertainty to an authority that is now permanent.

Additional requirements on investigators, effectively raising the standard for issuing NSLs. The Leahy bill would impose a new requirement on investigators who wish to use NSLs, in effect making it more difficult for federal authorities to investigate national security threats than to pursue common crimes like mail fraud and tax evasion. In addition to certifying relevance to a terrorist or intelligence investigation, investigators would also have to show “specific facts showing that there are reasonable grounds to believe that the information sought is relevant.”³ Such a standard is both vague – what is a specific fact? – and possibly difficult to meet in the early stages of investigation when NSLs are most useful. This vagueness of the standard could also lead to problems down the road as the lack of clear definitions will allow auditors to second guess time-sensitive decisions made by investigators and question the initial steps taken in critical investigations.

Additional restrictions on investigators’ ability to obtain business records from third parties. Section 215 of the PATRIOT Act concerns the government’s ability to obtain business records from third parties, such as banking information and car rental agreements, in which individuals have no reasonable expectation of privacy. Because obtaining such records is not a search under the Fourth Amendment, prosecutors in standard criminal investigations can seek these types of records through the

use of a simple grand jury subpoena. Under current law, national security investigators pursuing terrorists and other foreign agents, on the other hand, face the added burden of seeking court permission to obtain these records.

The Leahy bill would make it even more difficult for investigators pursuing critical national security investigations to obtain business records. Current law requires the government to submit a statement showing that such things are relevant to an authorized investigation and, provides that if such things pertain to a foreign power, activities of a suspected agent of a foreign power who is subject to the investigation, or an individual in contact with such a person, they are presumed to be relevant. The Leahy bill would remove this presumption. The bill also adds additional restrictions on investigators when the records involve the use of a library. Together, these requirements will make section 215 orders even more difficult to obtain than grand jury subpoenas in criminal cases.

Additional restrictions on the use of FISA pen registers and trap and trace devices. Pen registers (which retain a list of phone numbers called) and trap and trace devices (which catalogue a list of received calls) have long been used by law enforcement to obtain telephone transaction records. These devices do *not* capture the content of communications, just the source or destination of calls.⁴ Current law allows law enforcement to obtain pen registers and trap and trace devices under both criminal law and foreign intelligence surveillance. The standard to obtain pen registers and trap and trace devices is currently the same in these areas: that the information likely to be obtained is relevant.

The Leahy bill would also impose, for the first time ever, a higher requirement in the national security area that investigators compile and retain “a statement of facts and circumstances relied upon by the applicant to *justify the belief* of the applicant.”⁵ This new requirement makes obtaining a national security pen register or trap and trace device more difficult than in standard criminal investigations.

Shorter time for use of delayed notice search warrants. Delayed notice search warrants, well-accepted investigative tools, allow investigators who have a court order to search a property without immediately informing the suspect. The Leahy bill would dramatically cut the time by which investigators must inform the suspect from 30 days to 7 days. In this instance, it would place this burden on both national security and criminal investigations.

Following September 11, 2001, Congress took steps to ensure that national security investigators had access to tools analogous to those long available to criminal investigators. The FBI has stated repeatedly that these tools have been critical in keeping the nation safe in the years since. Limiting those tools, or adding conditions to their already limited use, would amount to several steps backwards. The Senate should reject Senator Leahy’s proposal and extend the PATRIOT ACT with no changes.

¹ “[Reauthorize Anti-Terror Tools Now](#),” RPC Policy Paper, February 13, 2011. These provisions had been set to expire at the end of February, but Congress passed H.R. 514, a short term extension which became law on February 25, 2011. They will now expire on May 28, 2011.

² S. 193.

³ S. 193, Sec. 7 (Amending 18 U.S.C. 2709).

⁴ The Supreme Court has held that pen registers do not constitute a search under the fourth amendment and do not require a warrant because the individual “voluntarily conveyed numerical information to the telephone company.” *Smith v. Maryland*, 442 U.S. 735 (1979).

⁵ S. 193, Sec. 4.